

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 2003B071

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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ANTON EVANS,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, LIMON CORRECTIONAL FACILITY,

Respondent.

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Administrative Law Judge (ALJ) Stacy L. Worthington heard this matter on March 3, 2003. Assistant Attorney General Danielle Moore represented respondent Department of Corrections (DOC), Limon Correctional Facility (LCF). Complainant represented himself.

**MATTER APPEALED**

Complainant appeals his disciplinary demotion. For the reasons set forth below, respondent's action is **affirmed**.

**ISSUES**

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of available alternatives.

**PRELIMINARY MATTERS**

The evening before the hearing, complainant faxed the ALJ a letter describing contacts between fact witnesses and respondent's counsel and objecting to respondent's Exhibit 10, which complainant stated he had not seen before. Complainant stated that he did not intend to request any relief in his letter, and he did not request any relief at the hearing.

Respondent made a motion *in limine* or for protective order limiting use of disciplinary actions that were taken against other DOC employees who were not parties

to this appeal. DOC moved to exclude such evidence or, in the alternative, for a protective order limiting the use of such evidence to this proceeding. Complainant agreed to the protective order, which was entered. However, no evidence was elicited concerning disciplinary actions against other employees.

The parties tendered stipulations of fact, which are incorporated into the Findings of Fact. The parties stipulated to the admission of Respondent's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, and 15. Exhibits 16, A, B, and C were admitted during testimony. Exhibit 10 was offered but excluded.

### **FINDINGS OF FACT**

The ALJ has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant has been employed by DOC for approximately 9 years. At the time of the incident that led to his demotion, complainant was a Correctional Security Service Officer II (Sergeant).

2. Complainant worked at LCF, which is a security level 4, or close custody, facility. This is the second highest security level at DOC.

3. The inmates who are incarcerated at LCF include inmates who presented management or behavior problems in county jails or DOC's diagnostic unit, inmates who may be ready to progress out of the maximum security facility, the Colorado State Penitentiary, and inmates who have been disruptive at level 2 or 3 and cannot be managed there. Many of the inmates have committed violent crimes, including murder.

4. The great majority of LCF inmates are extremely dangerous, but not all. Two hundred LCF inmates are serving life sentences, and about 90 are serving life sentences without possibility of parole. Over half are gang members who may commit acts of violence against rival gang members. It is a very volatile population. LCF has a capacity of 953 beds, and the total population usually stays within 10 of that number.

5. LCF employs about 300 staff, including approximately 180 correctional officers.

6. In 2002, there were several incidents that affected LCF staff, including physical and sexual assaults on staff. In October 2002, LCF Sgt. Eric Autobee was murdered by an inmate in the prison kitchen. It had been 72 years since a DOC employee was killed by an inmate.

7. Just before Sgt. Autobee died, LCF had 19 vacancies in uniformed staff. Employees were working overtime and shifts as long as 12 hours. Not long after he died,

LCF was able to hire 13 new correctional staff. Seven new correctional officers were employed in November 2002, and six began work in December 2002.

8. LCF staff had been under a great deal of stress. They were glad to get the new officers, because it relieved the stress and overwork in the facility. LCF greatly needed to retain the new officers, so staff were committed to training and mentoring them. During the orientation period, new employees work with experienced staff to ease their fears and weaknesses, and to teach them the right way to do things.

9. Newly hired employees are more vulnerable than experienced staff to the games criminals play. Many inmates know how to prey on others, including staff, and newly hired officers are very vulnerable to their tactics. LCF tries to protect their safety by, for example, making sure they are always escorted by another staff member when they're by themselves because the new employees do not know where they're going or how to take care of themselves. LCF relies on someone at CSSO II (sergeant) or CSSO III (lieutenant) level to help new employees.

10. DOC training emphasizes that employees must watch out for their own safety and the safety of other officers. DOC officers are not armed except for a form of pepper spray. DOC officers are taught that they cannot show any form of weakness or favoritism because inmates watch for weaknesses or other things they can use against officers, especially when the officers are new. Inmates will test new employees by asking for extra favors or by challenging authority to see how new officers react. DOC officers must establish a professional relationship with the inmates.

11. Douglas Maurath was hired as a CSSO I in November 2002. He had never worked in a prison setting before this job. Maurath began working at LCF after he had completed one month at DOC's training academy.

12. Lewis Schilling was hired at about the same time as Maurath, and also completed one month at the training academy before reporting to LCF.

13. Joshua Peiffer was hired as a CSSO I in October 2002. He completed one month at the training academy before reporting to LCF.

14. The first week of December 2002 was an orientation week for Maurath and Schilling. During that week, they were free to go to different areas to learn the operations of different parts of the facility.

15. On the morning of December 6, 2002, Maurath and Schilling decided to go to a living unit. When they arrived at living unit 4, Joshua Peiffer suggested that they conduct a "shakedown" or search of a cell for contraband. Peiffer checked the shakedown book and selected a cell that had not been searched recently. Maurath and Schilling asked a lot of questions because they had not done a shakedown before, and they were not sure what items they should take. The three were in the cell for about 30 minutes.

16. When they had completed their search, they brought the contraband they had discovered to a table in the day room. They forgot to close the cell door while they were at the table. Inmates came over to them at the table, which was inappropriate, and asked them questions about the items the officers had taken. There were between 6 and 20 inmates in the area, and there may have been other inmates above them on the tiers.

17. At some point while the three officers were in the day room, Complainant approached them and asked "What the fuck are you guys doing?" Complainant continued to talk to them with a loud, angry voice, using profanity. He took the three into the cell and showed them how to do a shakedown. The whole time they were in the cell, complainant was loud and used profanity. The three officers felt humiliated and embarrassed for being cussed out, especially in front of the inmates.

18. After complainant finished showing the three new officers how to conduct a shakedown, he brought them into the sergeants' office, where he continued to swear at them and rebuke them. During that conversation, complainant told the three new officers that they could "piss and shit on the inmates' stuff" without any penalty. He also criticized the training academy and told them that they were in the real world now and had to learn the way a prison really works.

19. The three new officers were then ordered to escort an inmate to segregation, then to complete an incident report on the shakedown. Maurath and Schilling took the inmate to segregation, then went back to write the reports.

20. Peiffer went to Sgt. Melburn, who told him to talk to Lt. Mary Carter. Peiffer went to Carter around 10 or 10:30 a.m. and told her what complainant did, that he was shocked by the incident, and that he thought that the other new officers would not want to come back to LCF because of the incident.

21. Peiffer had been chewed out by other sergeants, but had never been cussed at or reprimanded in front of inmates before.

22. Carter was the shift commander on December 6, 2002. When Peiffer came to her office, he appeared to be upset, appalled, and in shock. Carter told Peiffer to write an incident report.

23. Carter went and found Maurath and Schilling while they were writing their incident reports. She asked them what happened. They began to tell her about the shakedown, but she said, "Tell me what really happened." Maurath and Schilling then told her about complainant's conduct. Neither of the officers would have told her about the incident if she had not insisted because they were new and did not want to get a reputation for being a snitch.

24. The three new inmates were all very upset, embarrassed, and humiliated by being treated this way, especially in front of inmates. They felt like complainant was

treating them like children. They knew that inmates were watching and listening, and they knew that inmates generally look at new employees as if they are nothing. Being humiliated in front of inmates was especially demeaning.

25. Carter directed the three officers to write reports about the incident with complainant. She then took the reports to Warden Gary Watkins.

26. Since Watkins had become warden at LCF in 2000, he had tried to instill an atmosphere of professionalism in LCF staff. He expected staff to treat each other with respect and to develop teamwork. He has communicated this philosophy in two ways: He disseminated a philosophy statement to all staff when he came to LCF and gives the philosophy statement to every new hire, and he incorporates his philosophy into his regulations and post orders.

27. Profanity is not uncommon at LCF, though LCF management discourages it and will correct employees who use strong profanity. Watkins believes that uniformed staff should model the behavior they want the inmates to have. If staff model good, professional behavior, they'll usually get it from inmates; if they model belittling, demeaning behavior, they'll get that from inmates. If employees curse, that brings them down to the inmates' level.

28. When Watkins read the reports about complainant's conduct, he felt like everything he had done in the last two years had blown up in his face. He makes a point to talk to all new hires personally to welcome them, encourage them to make corrections a career, and give them his philosophy statement. He was very disturbed that the new employees had been treated in a way that was so contrary to his philosophy.

29. Watkins told Capt. Stephen Lockhart that complainant's conduct was totally unacceptable and that they needed to mend some fences with the new employees. Watkins instructed Lockhart to talk to complainant and have him write an apology letter. Complainant did write a letter to Maurath, Schilling, Peiffer, and Carter apologizing for his unprofessional actions.

30. Watkins held a Rule R-6-10 meeting on December 23, 2002. Complainant admitted his conduct. He said he did not intend anything by it, he just let his mouth override his brain. Watkins believed complainant was trying to minimize his behavior or explain it away.

31. After the R-6-10 meeting, Watkins consulted with other DOC officials. At least one of those officials advised Watkins to terminate complainant. Watkins reviewed complainant's personnel file and concluded that termination would be too harsh, since complainant was an 8- or 9-year employee with satisfactory to commendable evaluations and only one previous write-up.

32. Complainant's actions made the three new employees appear weak and ineffective to the inmates who witnessed the incident, and it gave the new employees a

bad impression during their orientation period. LCF had a great interest in getting employees off on the right foot, both to give them the knowledge, experience, and perceived authority they would need to deal effectively with inmates and also to enable DOC to retain them as career employees. If complainant had come to the three new employees and treated them professionally, they would have accepted his criticism and turned to him for advice in the future. Instead, they felt humiliated in front of inmates and would have to defend themselves to the inmates.

33. Watkins concluded that complainant's conduct was unprofessional and unacceptable, and that it was flagrant and serious enough to warrant discipline. If complainant had pulled the three new employees into an office and used the same language, Watkins probably would not have disciplined him. However, talking to the three new employees that way in the cellhouse in front of inmates was probably the most disgusting thing one DOC employee could do to another.

34. Watkins decided that the appropriate discipline was demotion. Complainant was a CSSO II at the time of the incident, which made him a mentor, coach, and role model for the other staff. Watkins did not believe that complainant could be an effective leader and role model in light of the incident, so he demoted complainant to CSSO I.

35. DOC Administrative Regulation (AR) 1450-1 requires DOC employees to develop professional relationships with colleagues that promote mutual respect, assistance, consideration, and harmony; to maintain considerate, cooperative, and cordial relationships with colleagues; and to exercise good judgment. It prohibits acts of disorderly conduct, verbal altercations, and any unbecoming conduct.

36. DOC AR 1450-5 requires DOC staff to treat each other in a professional manner, with dignity and respect.

## **DISCUSSION**

### **I. Standard of Proof.**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. 12, §§ 13(8); § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801, and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct or violation of the State Personnel Board rules or the rules of the agency of employment;
- (3) willful failure to perform or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen, supra*. The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

An appointing authority has the discretion to administer corrective and disciplinary actions. Rule R-1-6, 4 CCR 801. In the present matter, the appointing authority reasonably considered the evidence that he had before him and properly determined that disciplinary demotion was justified. He did not abuse his discretion. See Rules R-6-2, R-6-6, R-6-9, R-6-10, R-6-11, and R-6-12, 4 CCR 801 (regarding disciplinary actions).

## **II. Complainant committed the acts for which he was disciplined.**

Complainant committed the acts for which he was disciplined. In his written apology and at the R-6-10 meeting, complainant admitted that he had acted in an unprofessional way. He has never disputed the words that he used or his demeanor during the incident. He has attempted to explain away his conduct by describing it as merely "chewing out" inexperienced staff. However, there is no doubt that the language he used, the location of the "chewing out," and his demeanor were unprofessional, demeaning, undignified, and disrespectful. Moreover, by doing this in front of inmates, he made the new employees look weak in front of inmates. This could make it much more difficult for those employees to get the respect of the inmates, and may even put them in danger if inmates try to use this perceived weakness against the new employees.

## **III. The disciplinary action was not arbitrary, capricious or contrary to rule or law.**

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

*Lawley v. Dep't of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001), citing *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

The appointing authority based his findings and conclusions on substantial evidence. The discipline imposed falls within the range of alternatives available to the appointing authority. Respondent proved by a preponderance of the evidence that there was just cause for the discipline that was imposed. *See Dep't of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

Rule R-6-2, 4 CCR 801, which incorporates the concept of progressive discipline, provides that an appointing authority may properly impose disciplinary action, up to and including immediate termination, if it is determined that an employee's conduct was "so flagrant or serious" as to justify the action taken. Though not binding precedent, the reasoning of the court of appeals with respect to the definition of "flagrant or serious" in *Gonzales v. Dep't of Corrections*, Case No. 00CA1975 (Colo. App. 2001) (nsop), is hereby adopted and applied to the issue in this case. In *Gonzales*, the court said at 5:

To determine whether conduct was serious or flagrant we look to the ordinary meaning of those words. "Serious" means important or significant. See Webster's Third New International Dictionary 2073 (1986). "Flagrant" is defined as an act that purposefully violates normal standards or good sense. See Webster's, *supra* at 862.

Here, the record establishes that complainant engaged in conduct that violated DOC AR 1450-1, as well as the philosophy of professionalism and respect that Warden Watkins had tried to instill at LCF. Complainant's actions may have harmed the ability of the three new employees to work effectively with the inmates at LCF. It also demonstrated his inability to perform as a mentor and coach, which is a large part of the CSSO II's job. Complainant's conduct constituted "willful misconduct," it was serious and flagrant, and it justified disciplinary demotion.

### CONCLUSIONS OF LAW

1. Complainant engaged in the conduct for which discipline was administered.
2. Respondent's disciplinary demotion was not arbitrary, capricious or contrary to rule or law.

### ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_\_ day  
of April, 2003, at  
Denver, Colorado.

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Stacy L. Worthington  
Administrative Law Judge



## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS:**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). If a party chooses to appeal the decision, that party must file a designation of record with the Board within 20 calendar days of the date the decision of the ALJ is mailed to the parties, and must file a written notice of appeal with the State Personnel Board within 30 calendar days after the decision of the ALJ is mailed to the parties. The Board must receive the notice of appeal within the 30-day deadline. If the Board does not receive a written notice of appeal within the 30-day deadline, the decision of the ALJ becomes final and unappealable.

### **PETITION FOR RECONSIDERATION**

A party may file a petition for reconsideration of the ALJ's decision within 5 calendar days after receipt of the ALJ's decision. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. Filing a petition for reconsideration does not extend the 20-day deadline for filing a designation of record or the 30-day deadline for filing a notice of appeal of the decision of the ALJ.

### **RECORD ON APPEAL**

The party appealing the ALJ's decision must pay a \$50.00 fee to prepare the record on appeal. This fee does not include transcription costs. The party may pay the fee by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. If the Board does not receive the transcript within that time, the transcript will not be included in the record on appeal and the party will be prohibited from challenging the findings of fact. For additional information, contact the State Personnel Board office at (303) 894-2136.

## **CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_ day of April, 2003, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Anton Evans  
P.O. Box 1351  
Limon, CO 80828

And through interagency mail to:

Danielle Moore  
Assistant Attorney General  
Employment Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, CO 80203

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